W. D. No. 61655

IN THE
COURT OF APPEALS
FOR THE WESTERN DISTRICT
OF MISSOURI

AMERISTAR JET CHARTER, INC. and
SIERRA AMERICAN CORPORATION,
Appellants and
Respondents/Cross-Appellants,

v.

DODSON INTERNATIONAL PARTS, INC.,
Appellant and Respondent,
HOUSTON CASUALTY COMPANY,
Respondent, and
HOWE ASSOCIATES, INC.,
Defendant.

Appeal from the Circuit Court of
Jackson County, Missouri at Kansas City

BRIEF OF APPELLANTS AND CROSS-APPELLANTS
Ameristar Jet Charter, Inc. and Sierra American Corporation

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

These consolidated appeals arise out of two judgments from the same underlying lawsuit: (1) Ameristar Jet Charter, Inc. and Sierra American Corporation (collectively, "Ameristar") appeal the order entered by the Honorable John R. O'Malley, Circuit Judge of the Circuit Court of Jackson County, Missouri, on September 14, 2000, granting summary judgment against Ameristar and in favor of Houston Casualty Company based on a release; and (2) Ameristar's cross-appeal (in response to the appeal of Dodson International Parts, Inc. ("Dodson")) of the post-trial judgment for Ameristar and against Dodson entered by the Circuit Court of Jackson County, the Honorable Lee E. Wells, on June 14, 2002, which disposed of all remaining claims in the lawsuit. The summary judgment and the post-trial judgment are thus final and appealable judgments pursuant to Missouri Rules of Civil Procedure 74.01 and 81.05. This Court has appellate jurisdiction pursuant to the Missouri Constitution, Article V, Section 3, and Missouri Rules of Civil Procedure 81.01, *et seq*.

STATEMENT OF FACTS

This appeal arises out of an insurance dispute after the insurer, over the insured's objection, declared an under-insured airplane a total loss. In April 1998, Sierra American Corporation and Ameristar Jet Charter, Inc. (collectively "Ameristar"), owned and operated a Dassault Falcon 20 jet aircraft having Serial No. 16 and Registration (or "tail") number N216TW (the "Aircraft"). (L.F. 403) Ameristar is in the on-demand air charter business, deriving the majority of its business from carrying auto parts for the "big three" auto manufacturers. (L.F. 403) Ameristar used the Aircraft to deliver parts to the manufacturers. On April 9, 1998, the Aircraft made an emergency ("off-airport") landing in Jackson County, Missouri. (L.F. 209, 210, 403) At the time, the Aircraft was insured by Houston Casualty Company ("HCC") in the amount of $1,500,000.00, but it had a value of approximately $1,800,000.00. (L.F. 57, 62) In accordance with its policy with HCC, Ameristar notified Larry Galizi ("Galizi") of the emergency landing. (L.F. 393) Galizi was the person who sold the insurance to Ameristar. (L.F. 393)

After the emergency landing, HCC, through Howe Associates, Inc. ("Howe"), hired Dodson International Parts, Inc. ("Dodson") to transport the Aircraft to the Kansas City, Missouri downtown airport. (L.F. 90) Transporting the Aircraft to the airport required Dodson to remove the wings from the Aircraft and haul them separately from the fuselage of the Aircraft. (L.F. 116-121) Dodson transported the fuselage by placing it on a flat-bed trailer, supported by tires and railroad ties. (L.F. 116-121)

After it inspected the Aircraft, Howe informed Ameristar and HCC that the fuselage was permanently bent, that the Aircraft had severe structural damage, and that the cost to repair the Aircraft was prohibitively high. (L.F. 363, 377) This assessment was made without ever taking the Aircraft off of the trailer, tires, and cross-ties on which Dodson had moved it. (L.F. 365-366)

HCC declared the Aircraft a total loss, obligating itself to pay Ameristar the $1,500,000.00 policy proceeds. (L.F. 355) Ameristar repeatedly requested that the Aircraft be removed from the trailer for inspection. (L.F. 363, 375) Despite Ameristar's requests, HCC refused to remove the Aircraft from the trailer to determine the actual extent of the damage. (L.F. 363) HCC told Ameristar that HCC had the "right" to declare the Aircraft a total loss even if Ameristar objected. (L.F. 398, 400-401)

Despite its contractual obligation to pay Ameristar the policy proceeds, HCC required Ameristar to execute a Proof of Loss ("POL") before it would agree to make payment, which Ameristar did. (L.F. 60, 63, 98, 100, 162-163) The POL contained an alleged "release" of claims "under the policy" for "said loss." Specifically, the release stated:

> In consideration of such payment said Company is hereby discharged and forever released from any and all further claim, demand or liability whatsoever for ***said loss*** and damage***, under the Policy herein referred to***, repairs and/or replacements having been made to my entire satisfaction.

(L.F. 234) (emphasis added) After signing the POL, Ameristar received payment from HCC of the $1,500,000.00 policy proceeds. (L.F. 60, 100) Ameristar was unable to replace the Aircraft for almost nine (9) months due to difficulties in finding a comparable aircraft for sale,

and having a cargo door installed by one of only two individuals certified to do that work. (Tr. 328-329, 334-335) As a result, Ameristar lost more than $2 million in profits. (Tr. 338-362)

After the Aircraft was declared a total loss by HCC, Dodson purchased the Aircraft from HCC. (L.F. 93) Dodson was then able to repair the Aircraft for approximately $100,000.00. (L.F. 93) The fuselage was not permanently bent. (L.F. 138-139) Instead, it "popped" back into place once it was removed from the trailer. (L.F. 138-139)

Ameristar brought this lawsuit against Dodson, Howe, and HCC in the Circuit Court of Jackson County, Missouri, asserting claims of negligence, negligent misrepresentation, and bad faith. Ameristar sought to recover its uninsured loss (the underinsured value of the Aircraft) and its lost profits -- an amount found at trial to be $2.1 million. (L.F. 268-277; 688) Prior to trial, HCC moved the trial court for summary judgment based on the release language contained in the POL. (L.F. 174-180; 181-267) On September 26, 2000, the trial court, the Honorable John R. O'Malley, granted HCC's motion for summary judgment, finding "that [Ameristar's] claims arise out of the relationship between the Plaintiff and Houston Casualty Company. Therefore, the claim of [Ameristar] is 'mentioned' [in the release]." (L.F. 564) Ameristar settled its claim against Howe for $50,000.00 prior to trial (the "Howe Settlement"). (L.F. 874; 915)

In April 2002, Ameristar's claim against Dodson for negligence was tried to a jury. (L.F. 579-585; 689-692) The jury returned a verdict finding Dodson seventy percent (70%) responsible and Ameristar thirty percent (30%) responsible. (L.F. 688) The jury found Ameristar's damages to be $2.1 million. (L.F. 688) Based on the jury's findings, the trial

court, the Honorable Lee E. Wells, entered judgment in favor of Ameristar in the amount of $1,435,000.00. (L.F. 873-876) This amount was calculated as follows:

$2,100,000.00	amount of jury verdict
- $50,000.00	set-off for Howe settlement
$2,050,000.00	
- $615,000.00	less 30% Ameristar found at fault
$1,435,000.00	**Total**

(L.F. 874; 915)

Following a Motion to Alter Judgment filed by Dodson, however, the trial court modified its judgment. (L.F. 915-916) Specifically relevant to this appeal, the trial court modified its damage calculation. (L.F. 915) In its final judgment, the trial court changed the way it applied the credit for the Howe Settlement, thereby reducing the amount of Ameristar's award. (L.F. 915) The trial court recalculated Ameristar's award as follows:

$2,100,000.00	amount of jury verdict
$1,470,000.00	70% liability to defendant [Dodson]
- $50,000.00	set-off for settlement with Howe
$1,420,000.00	**Total**

(L.F. 915)

On July 16, 2002, Ameristar filed its Notice of Appeal of the summary judgment in favor of HCC. (L.F. 909-914) On August 23, 2002, Dodson filed its Notice of Appeal. (L.F. 917-927) On November 14, 2002, Ameristar filed its Notice of Cross Appeal. (L.F. 928-938) All of these appeals have been consolidated.

POINTS RELIED ON

Point One: **THE TRIAL COURT ERRED IN GRANTING HOUSTON CASUALTY CORPORATION'S ("HCC'S") MOTION FOR SUMMARY JUDGMENT BASED ON A RELEASE CONTAINED IN THE PROOF OF LOSS ("POL") AMERISTAR SIGNED BECAUSE THERE WERE GENUINE ISSUES OF MATERIAL FACT ON THE FOLLOWING ISSUES, MAKING SUMMARY JUDGMENT IN HCC'S FAVOR IMPROPER:**

A. THERE WAS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE POL RELEASED AMERISTAR'S EXTRA-CONTRACTUAL CLAIMS (*i.e.*, CLAIMS FOR NEGLIGENCE, NEGLIGENT MISREPRESENTATION AND BAD FAITH) IN THAT, UNDER THE GOVERNING TEXAS LAW, THE POL DOES NOT APPLY TO AMERISTAR'S TORT-BASED CLAIMS AGAINST HCC;

Lyons v. Millers Cas. Ins. Co., 866 S.W.2d 597 (Tex. 1993).
Memorial Med. Ctr. v. Keszler, 943 S.W.2d 433 (Tex. 1977) (per curiam).

B. THERE WAS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE POL RELEASED AMERISTAR'S CLAIMS FOR UNINSURED LOSSES IN THAT THE SUMMARY JUDGMENT RECORD DEMONSTRATES THAT THE RELEASE DRAFTED BY HCC ONLY APPLIED TO "SAID LOSS" AND CLAIMS "UNDER THE POLICY" AND DID NOT UNAMBIGUOUSLY PROHIBIT CLAIMS FOR UNINSURED LOSSES;

State Farm Fire & Cas. Co. v. Reed, 873 S.W.2d 698 (Tex. 1993).

C. THERE WAS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE RELEASE WAS INDUCED BY HCC'S MISREPRESENTATIONS AND MAY BE AVOIDED, IN THAT:

1. HCC MISREPRESENTED THE CONDITION OF THE AIRCRAFT BEFORE AMERISTAR SIGNED THE RELEASE, AND

Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171 (Tex. 1997)
Wal-Mart Stores, Inc. v. Itz, 21 S.W.3d 456 (Tex. App. -- Austin 2000, writ denied)

2. HCC MISREPRESENTED THAT IT HAD THE RIGHT TO DECLARE THE AIRCRAFT A TOTAL LOSS AGAINST AMERISTAR'S WISHES; AND

Lee v. Lee, 44 S.W.3d 151 (Tex. App.--Houston [1st Dist.] 2001, writ denied).
Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171 (Tex. 1997).

D. THERE WAS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE RELEASE WAS SUPPORTED BY CONSIDERATION IN THAT HCC WAS CONTRACTUALLY OBLIGATED TO PAY AMERISTAR THE $1.5 MILLION INSURED VALUE OF THE AIRCRAFT AFTER IT DECLARED THE AIRCRAFT A TOTAL CONSTRUCTIVE LOSS, WHETHER OR NOT AMERISTAR PROVIDED A RELEASE;

Federal Sign v. Texas S. Univ., 951 S.W.2d 401 (Tex. 1997).
Victoria Bank & Trust Co. v. Brady, 779 S.W.2d 893 (Tex. App.--Corpus Christi 1989), *rev'd in part on other grounds*, 811 S.W.2d 931 (Tex. 1991).

Point Two: **THE TRIAL COURT ERRED AS A MATTER OF LAW IN CALCULATING THE AMOUNT OF AMERISTAR'S AWARD WHEN IT SUBTRACTED THE $50,000 AMOUNT OF AMERISTAR'S SETTLEMENT WITH HOWE ASSOCIATES, INC. AFTER REDUCING AMERISTAR'S DAMAGES BASED ON THE JURY'S APPORTIONMENT OF FAULT BETWEEN DODSON PARTS INTERNATIONAL, INC. AND AMERISTAR, BECAUSE THE TRIAL COURT'S ACTION CONFLICTS WITH MISSOURI SUPREME COURT PRECEDENT IN THAT THE SUPREME COURT SPECIFICALLY HELD IN *JENSEN V. ARA SERVICES, INC.* THAT A SETTLEMENT CREDIT IN THIS SITUATION MUT BE DEDUCTED PRIOR TO REDUCING A PARTY'S DAMAGES BASED ON APPORTIONMENT OF FAULT.**

Jensen v. ARA Services, Inc., 736 S.W.2d 374 (Mo. 1987) (en banc) (per curiam).
R.S. Mo. § 537.060

ARGUMENT AND AUTHORITIES

I. THE TRIAL COURT ERRED IN GRANTING HOUSTON CASUALTY CORPORATION'S ("HCC'S") MOTION FOR SUMMARY JUDGMENT BASED ON A RELEASE CONTAINED IN THE PROOF OF LOSS ("POL") AMERISTAR SIGNED BECAUSE THERE WERE GENUINE ISSUES OF MATERIAL FACT ON THE FOLLOWING ISSUES, MAKING SUMMARY JUDGMENT IN HCC'S FAVOR IMPROPER.

Standard of Review

An appellate court reviews the trial court's grant of summary judgment *de novo*. *McDermott v. Missouri Bd. of Probation & Parole*, 61 S.W.3d 246, 247 (Mo. 2001) (en banc) (per curiam). "The criteria on appeal for testing the propriety of summary judgment are no different from those that should be employed by the trial court to determine the propriety of sustaining the motion initially." *Id*. In reviewing a summary judgment, the record is reviewed in the light most favorable to the party against whom summary judgment was granted and the non-movant is accorded the benefit of all reasonable inferences from the record. *Letsinger v. Drury College*, 68 S.W.3d 408, 410 (Mo. 2002) (en banc) (per curiam). The appellate court "does not defer to the trial court's judgment granting summary judgment . . . ." *Id*.; *McDermott*, 61 S.W.3d at 247.

In the proceedings before the trial court, HCC and Ameristar agreed that Texas law governed the dispute between them. (L.F. 185, 341) However, the trial court erred in how it applied Texas law.

The trial court granted HCC's Motion for Summary Judgment based on release language contained in the POL that Ameristar was required to sign. Ameristar raised several fact issues with regard to the validity, application and extent of the alleged release. Because Ameristar

raised material fact issues, the trial court's grant of summary judgment was error, and this Court should reverse the order granting summary judgment for HCC.

A. THERE WAS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE POL RELEASED AMERISTAR'S EXTRA-CONTRACTUAL CLAIMS (i.e., CLAIMS FOR NEGLIGENCE, NEGLIGENT MISREPRESENTATION AND BAD FAITH) IN THAT THE POL, UNDER THE GOVERNING TEXAS LAW, DOES NOT APPLY TO AMERISTAR'S TORT-BASED CLAIMS AGAINST HCC.

The trial court erred in granting HCC's motion for summary judgment on the ground that Ameristar's claims were released by the POL. (L.F. 564) The POL is limited in scope; it only includes a release of claims *under the Policy* (that is, contract claims) for the insured loss. The POL does not include a release of the claims brought by Ameristar in this case -- *tort claims.* The release states:

> In consideration of such payment said Company is hereby discharged and forever released from any and all further claim, demand or liability whatsoever for ***said loss*** and damage***, under the Policy herein referred to***, repairs and/or replacements having been made to my entire satisfaction.

(L.F. 234) In this action, Ameristar did not make a claim against HCC "under the policy." Instead, Ameristar sued HCC based on claims of negligence, negligent misrepresentation, and bad faith. The plain language of the release is not applicable to, and does not affect, Ameristar's tort claims.

Texas law clearly indicates that the POL only releases contractual claims under the insurance policy, and not claims based in tort. Texas legal principles recognize that an insurer's liability under an insurance contract is *separate and distinct* from its liability for the tort of bad faith. *Lyons v. Millers Cas. Ins. Co.*, 866 S.W.2d 597, 600 (Tex. 1993).

Texas law requires a release to "mention" a specific claim to be effective. *Memorial Med. Ctr. v. Keszler*, 943 S.W.2d 433, 434-35 (Tex. 1977) (per curiam). The HCC POL that Ameristar signed does not specifically mention tort claims. The trial court's order considered Ameristar's claims "mentioned" simply by virtue of the fact that they arise out of HCC's and Ameristar's relationship. (L.F. 564) This is a misapplication of the holding in *Keszler*. The POL in the instant case does not "mention" tort claims; instead, it is specifically limited to claims "***under the Policy***."

Further, the release at issue in *Keszler* was much broader than the one at issue here. That release specifically referred to:

> ...all claims, demands, actions, and causes of action of any kind whatsoever . . . relating to the [the doctor's] relationship with [the hospital] . . . it being the intent of [the doctor] to release all claims of any kind or character which he might have against [the hospital].

Keszler, 943 S.W.2d at 434. On the contrary, the release here is limited to specific claims -- those "under the policy" for "said loss"; that is, those under the insurance contract for the $1.5 million insured value of the Aircraft. The court's misapplication of *Keszler* was error, and summary judgment in HCC's favor was improper.

B. THERE WAS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE POL RELEASED AMERISTAR'S CLAIMS FOR UNINSURED LOSSES IN THAT THE SUMMARY JUDGMENT RECORD DEMONSTRATES THAT THE RELEASE DRAFTED BY HCC ONLY APPLIED TO "SAID LOSS" AND CLAIMS "UNDER THE POLICY" AND DID NOT UNAMBIGUOUSLY PROHIBIT CLAIMS FOR UNINSURED LOSSES.

The trial court also erred in granting summary judgment because there was a genuine issue of material fact as to the breadth of the release. Ameristar did not seek to recover any portion of the insured loss -- the $1.5 million already paid by HCC. Instead, Ameristar sought to recover its additional *uninsured* losses caused by the defendants' conduct. Specifically, Ameristar sought to recover the underinsured value of the Aircraft and Ameristar's lost profits from the loss of the use of the Aircraft when the Aircraft was "totaled" over Ameristar's objection.

The "release" on which the trial court granted summary judgment is limited to claims for "said loss" (the loss for which payment was already made) "under the policy." (L.F. 234) The release simply does not apply to Ameristar's claims for uninsured losses. In fact, Larry Galizi, HCC's agent, confirmed to Ameristar (before it cashed the HCC check) that the POL did not prohibit claims against *anyone* for uninsured losses. (L.F. 399) Therefore, there is a genuine issue of material fact issue about the breadth and scope of the release, which made summary judgment for HCC improper.

At the very least, Ameristar raised an issue of material fact with regard to the meaning of the phrases "said loss" and "under the policy." Any ambiguity in the release language in the POL must be resolved against HCC, the one who drafted the document, and in favor of

Ameristar. *State Farm Fire & Cas. Co. v. Reed*, 873 S.W.2d 698, 699 (Tex. 1993). The trial court failed to do so. Therefore, the trial court erred in granting HCC's motion for summary judgment.

C. THERE WAS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE RELEASE WAS INDUCED BY HCC'S MISREPRESENTATIONS AND MAY BE AVOIDED.

The trial court further erred in granting summary judgment to HCC because Ameristar raised genuine issues of material fact as to the validity of the release by presenting evidence that the release was induced by HCC's misrepresentations.

1. HCC MISREPRESENTED THE CONDITION OF THE AIRCRAFT BEFORE AMERISTAR SIGNED THE RELEASE.

After the emergency off-airport landing, HCC communicated with Ameristar, its insured, through HCC's adjuster, Howe. Ameristar presented evidence that: (1) Howe was hired by HCC to assess the cost to repair the Aircraft, and (2) Howe was HCC's agent for purposes of communicating with Ameristar. (L.F. 354, 357, 360) The representations by Howe about the condition of the Aircraft are imputed to HCC since Howe was acting as HCC's agent. *See generally Wal-Mart Stores, Inc. v. Itz*, 21 S.W.3d 456, 477 (Tex. App.--Austin 2000, writ denied).

Ameristar presented evidence that, through Howe, HCC represented to Ameristar that the Aircraft was permanently bent, had severe structural damage, and that the cost to repair the Aircraft was prohibitively high. (L.F. 377, 365-366) These representations were false. Had HCC removed the Aircraft from the trailer as Ameristar requested, it would have been apparent

that the fuselage was not permanently bent, as evidenced by Dodson's subsequent purchase and repair of the Aircraft for only $100,000.00. Thus, HCC's statements about the condition of the fuselage and the cost to repair the Aircraft were false at the time they were made. Furthermore, HCC was negligent by refusing Ameristar's request to remove the Aircraft from the trailer so that it could be inspected.

A release is a contract. *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 178 (Tex. 1997). A contract induced by misrepresentations may be avoided. *Id*. at 178-179. HCC's misrepresentations about the condition of the Aircraft, coupled with the representations by Larry Galizi, HCC's agent, that the POL did not prohibit claims for uninsured losses against anyone, raised a genuine issue of material fact as to the validity of the release. Summary judgment for HCC was therefore improper.

2. HCC MISREPRESENTED THAT IT HAD THE RIGHT TO DECLARE THE AIRCRAFT A TOTAL LOSS AGAINST AMERISTAR'S WISHES.

Further, Ameristar introduced evidence that the release was not entered into voluntarily. HCC argued that the Plaintiffs "freely and voluntarily entered into the release." (L.F. 192) Ameristar introduced evidence that it was induced to sign the POL through statements by HCC's agent that HCC had the "right" to declare the Aircraft a total constructive loss, even if Ameristar objected. (L.F. 398, 400-401) In fact, HCC did not have that right. (L.F. 356) In addition, Ameristar introduced evidence that had it known that HCC did not have the right to "total" the Aircraft, it would have insisted that the Aircraft be repaired. (L.F. 393-394) The

evidence indicated that Ameristar was coerced into signing the POL by misrepresentations of HCC's agent.

A contract entered into as a result of coercion is invalid. *Lee v. Lee*, 44 S.W.3d 151, 154 (Tex. App.--Houston [1st Dist.] 2001, writ denied) (citing *Kosowska v. Kahn*, 929 S.W.2d 505, 508 (Tex. App.--San Antonio 1996, writ denied) (holding that duress or coercion would invalidate a contract if the coercion comes from the opposing party)). Whether HCC's conduct rose to the level of coercion was a question of fact to be resolved by the jury. Summary judgment was improper because Ameristar raised a genuine issue of material fact with regard to whether the release was entered into voluntarily or as a result of coercion.

D. THERE WAS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE RELEASE WAS SUPPORTED BY CONSIDERATION IN THAT HCC WAS CONTRACTUALLY OBLIGATED TO PAY AMERISTAR THE $1.5 MILLION INSURED VALUE OF THE AIRCRAFT IT DECLARED THE AIRCRAFT A TOTAL CONSTRUCTIVE LOSS, WHETHER OR NOT AMERISTAR PROVIDED A RELEASE.

Finally, Ameristar raised a genuine issue of material fact as to whether the release was supported by consideration. A release, like any other type of contract, must be supported by consideration to be valid. *Victoria Bank & Trust Co. v. Brady*, 779 S.W.2d 893, 903 (Tex. App.--Corpus Christi 1989), *rev'd in part on other grounds*, 811 S.W.2d 931 (Tex. 1991). "A contract that lacks consideration, lacks mutuality of obligation and is unenforceable." *Federal Sign v. Texas S. Univ.*, 951 S.W.2d 401, 408 (Tex. 1997). A release, like any other contract, may be invalidated for lack of consideration. *Victoria Bank & Trust Co.*, 779 S.W.2d at 903.

In the absence of terms in the insurance policy requiring the insured to execute a receipt upon payment of the loss, the insurer cannot exact such a receipt. 6 Appleman, *Insurance Law and Practice*, § 4009 (1972). The payment of a liquidated, undisputed, matured obligation does not furnish the consideration for the release of any additional obligation:

> The payment of a sum admittedly due and payable furnishes no consideration for the discharge of an additional and distinct amount or item of liability, and does not effect an accord and satisfaction thereof.

1 CJS, Accord and Satisfaction, § 29.

The Arkansas Supreme Court phrased the doctrine as follows:

> If no benefit is received by the obligee except what he was entitled to under the original contract, and the other party to contract parts with nothing except what he was already bound for, there is no consideration for the additional contract concerning the subject-matter of the original one.

DeSoto Life Ins. Co. v. Jeffett, 196 S.W.2d 243, 246 (Ark. 1946) (quoting *Feldman v. Fox*, 164 S.W. 766, 767 (Ark. 1914)).

Here, the insurer, HCC, exacted a "release" as a condition to payment of the policy proceeds. The release is unenforceable because it was not supported by consideration. After HCC declared the Aircraft a constructive total loss, HCC only did what it was contractually obligated to do -- pay Ameristar the $1.5 million insured value of the Aircraft. Furthermore, there was no evidence of any requirement in the policy that Ameristar execute a release in order to get paid. When HCC declared the Aircraft a constructive total loss, it was contractually obligated to pay Ameristar $1.5 million and it had no right to require Ameristar to execute a release. Therefore, there is a genuine issue of material fact whether the release

is supported by consideration, and the rendition of summary judgment in favor of HCC was improper.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN CALCULATING THE AMOUNT OF AMERISTAR'S AWARD WHEN IT SUBTRACTED THE $50,000 AMOUNT OF AMERISTAR'S SETTLEMENT WITH HOWE ASSOCIATES, INC. AFTER REDUCING AMERISTAR'S DAMAGES BASED ON THE JURY'S APPORTIONMENT OF FAULT BETWEEN DODSON PARTS INTERNATIONAL, INC. AND AMERISTAR, BECAUSE THE TRIAL COURT'S ACTION CONFLICTS WITH MISSOURI SUPREME COURT PRECEDENT IN THAT THE SUPREME COURT SPECIFICALLY HELD IN *JENSEN V. ARA SERVICES, INC.* THAT A SETTLEMENT CREDIT IN THIS SITUATION MUST BE DEDUCTED PRIOR TO REDUCING A PARTY'S DAMAGES BASED ON APPORTIONMENT OF FAULT.

In its final judgment, the trial court -- in direct contravention of Missouri Supreme Court controlling precedent -- improperly applied the credit for the Howe Settlement in its damages calculation. The trial court's calculation is wrong as a matter of law.

In *Jensen v. ARA Services, Inc.*, the Missouri Supreme Court discussed at length the proper method of calculating damages where, as here, there was a settling defendant and a non-settling defendant and a jury's apportionment of fault between the plaintiff and non-settling defendant. 736 S.W.2d 374, 375-78 (Mo. 1987) (en banc) (per curiam). In no uncertain terms, the Missouri Supreme Court held that the amount of such a settlement should be subtracted from the total jury award *prior to apportioning the damages*. *Id*. at 377-78. The Court reasoned that, under Missouri law as set forth in R.S. Mo. § 537.060, "fault is only to be apportioned among those at trial." *Id.* at 377. Because the settlement occurred before trial, the settlement amount had to be subtracted from the total award *prior to* any reduction of the damages based on apportionment of fault. *Id.*

In this case, the trial court originally calculated Ameristar's award in accordance with *Jensen*, as follows:

$2,100,000.00	amount of jury verdict
- $50,000.00	set-off for Howe Settlement
$2,050,000.00	
- $615,000.00	less 30% Ameristar found at fault
$1,435,000.00	**Total**

(L.F. 874, 915)

However, in ruling on Dodson's Motion to Alter the Judgment, the trial court acted in a manner precisely the opposite of the Missouri Supreme Court's instruction in *Jensen*. The trial court, in granting Dodson's Motion, first reduced Ameristar's award by the liability percentages assessed by the jury between Ameristar and Dodson, and then subtracted the Howe Settlement. Specifically, the trial court re-calculated Ameristar's award as follows:

$2,100,000.00	amount of jury verdict
$1,470,000.00	70% liability to defendant
- $ 50,000.00	set-off for settlement with Howe
$1,420,000.00	**Total**

(L.F. 915) The trial court did not explain its reasons for re-calculating Ameristar's award in this way. (*See* L.F. 915-16)

The trial court's improper application of the settlement credit reduced Ameristar's recovery by $15,000.00 and was wrong as a matter of law. The trial court's original damage calculations correctly applied the credit for the Howe Settlement prior to reducing Ameristar's damages based on the jury's apportionment of fault between Dodson and Ameristar, as required by *Jensen*.

Accordingly, the trial court's recalculation of Ameristar's award should be reversed and this Court should modify the judgment to award Ameristar $1,435,000.00 -- the correct amount of Ameristar's award under the methodology required by the Missouri Supreme Court for calculating damages in this situation.

CONCLUSION

For these reasons, Ameristar asks this Court to reverse the summary judgment granted by the trial court in favor of HCC, and remand the case for a trial of those claims. Ameristar further asks that this Court reverse the trial court's damage calculation and render a judgment reflecting the proper application of the Howe Settlement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was hand-delivered on this 14th day of March, 2003, to the following:

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Sierra American Corporation

RULE 84.06(c) CERTIFICATION

I hereby certify that this brief complies with the word limitations imposed by Missouri Court Rule 84.06(c) as verified by the word count of Corel Word Perfect 6.0. The brief contains 5,083 words and 604 lines. I further certify that the disk filed with this brief has been scanned for viruses and that it is virus free.

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Attorney for Appellants and
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APPENDIX

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